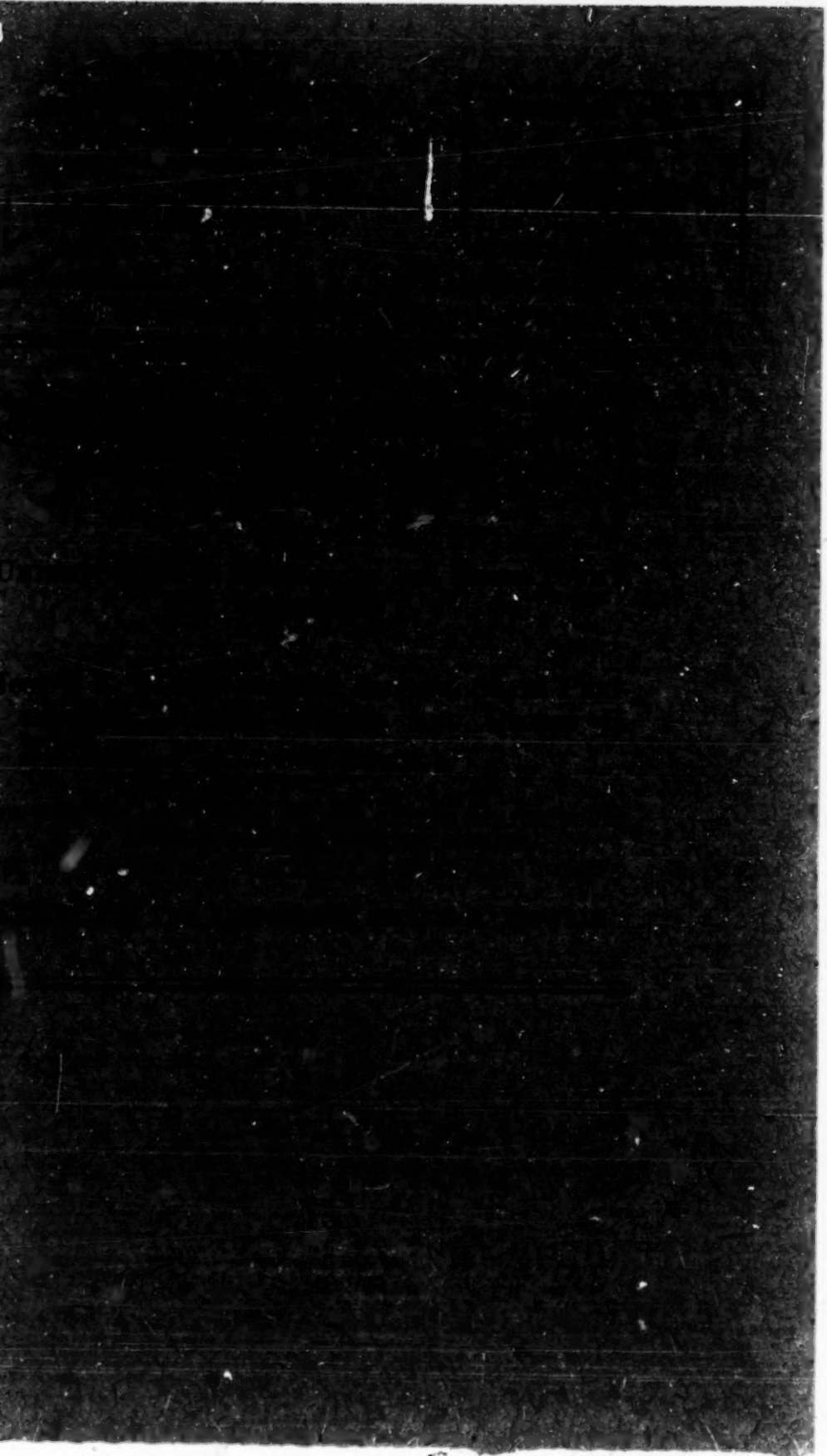

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 83

UNITED STATES OF AMERICA, EX REL. ROGER TOUHY, PETITIONER

v.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS, AND GEORGE R. MCSWAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE R. McSWAIN

OPINIONS BELOW

The majority (R. 159–171) and dissenting (R. 171–173) opinions in the Court of Appeals are reported at 180 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1950 (R. 174). The petition for a writ of certiorari was filed on May 22, 1950, and was granted on October 9, 1950 (R. 178). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a Federal Bureau of Investigation agent, ordered by a subpoena *duces tecum* issued in a habeas corpus proceeding by a state prisoner to produce certain Department of Justice records deemed confidential by the Attorney General, was properly adjudged guilty of contempt for failure to obey the subpoena, or whether the records sought by the subpoena were privileged.

2. Whether, in the circumstances of this case, the privilege against disclosure of confidential executive documents was so overborne by considerations of due process, fairness, and the like, as to require delivery of the departmental records sought not only to the trial court, as the Government proposed, but to counsel for the party on whose behalf the subpoena issued and who concurred in the Government's proposal.

STATUTE AND REGULATION INVOLVED

R. S. § 161, 5 U. S. C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, issued May 2, 1939, 11 F. R. 4920, provides:

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General.

Supplement No. 2 to Department of Justice Order No. 3229, dated June 6, 1947, provides:

To All United States Attorneys:

PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its

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materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
Attorney General.

STATEMENT

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois against Joseph E. Ragen, Warden of the Illinois State Penitentiary at Joliet, alleging that he was being illegally detained in violation of his constitutional rights as a result of a conspiracy between certain authorities of the State of Illinois, of Cook County, Illinois, and of the United States, whereby he was tried, convicted, and sentenced to imprisonment for 99 years for the alleged kidnaping of one John (Jake the Barber) Factor, a crime which petitioner claimed never occurred (R. 2–45, 91–92, 109–112). In the course of the proceedings on this petition, counsel for petitioner caused (R. 115) a subpoena *duces tecum* to be issued to "George B. McSwain, Agent in Charge—Hon. Tom C. Clark, Federal Bureau of Investigation, Bankers Building, Chicago, Illinois, % Otto Kerner, Jr., United States Attorney," calling for

the production of "certain records of investigation made and statements of witnesses taken and procured in connection with the alleged kidnapping of John (Jake the Barber) Factor in and about Chicago, Cook County, Illinois, in the months of July and August 1933, including, specifically transcript, records, memoranda, and other data with respect to certain show ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive, together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause" (R. 113–114). The subpoena was served upon McSwain (R. 115, 135) and upon United States Attorney Kerner "as the representative of the Department of Justice in this District" (R. 134).

On the return date of the subpoena, Mr. Kerner appeared for McSwain, Mr. Johnstone appeared for petitioner, and attorneys from the office of the Attorney General of Illinois and the office of the State's Attorney of Cook County appeared for Warden Ragen (R. 114). Called by Johnstone as his first witness, Kerner replied as follows to the query whether he had produced the documents requested: "We have not produced the documents requested by the subpoena, in compliance with Department of Justice Order

No. 3229, and also by Supplement No. 2 dated June 6, 1947." He went on to refer to instructions he had received from the Attorney General, in a letter signed by Assistant Attorney General Alexander M. Campbell, to the effect that he should "decline to produce the records" and "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 115–116).[1]

Judge Barnes read the subpoena, and in response to his query as to whether Johnstone wanted "anything in addition pursuant to that last clause," Johnstone replied: "No, sir. Specifically, I want the records of the show ups" (R. 118–119). After the court inquired about the regulations in regard to the production of the documents, Kerner read Department of Justice Order No. 3229, Supplement No. 2, and 5 U. S. C. 22 (R. 119–121). After the judge stated he could not determine whether the documents were material until he saw them and Kerner agreed that this was correct, the following occurred (R. 123):

> By the COURT. Now what? Is this relator to be deprived of having his counsel look at them?
>
> * * * * * *
>
> By Mr. KERNER. It is a matter of discretion with the Court to ascertain whether

[1] See *supra*, pp. 3–6.

or not they are material, and I will provide them for the Court's personal perusal.

By the COURT. What can I do in looking at them without counsel looking at them? He cannot make his record on that.

By Mr. KERNER. Well, I am standing on my instructions that I cannot produce them, on orders of the Attorney General.

Following a discussion by the court and counsel as to legal authorities, the court said (R.124–125):

I am of the opinion that the regulation as drafted is broader than the statute permits, because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law."

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But the parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or

> may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. * * *
>
> * * * * *
>
> Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. * * * If you can suggest a method whereby I can rule effectively I will be very glad to have it.

Kerner's suggestion, agreed to by all counsel, was that he should produce the documents before the judge in chambers with counsel present and read them (R. 125).

At the conference in the judge's chambers, Kerner stated that he would prefer his disclosures to be off the record because of "the dangerous character of certain things that I am going to reveal."[2] Johnstone then stated, "As far as I am concerned, I am perfectly willing to have the United States Attorney submit the material to the Court, and abide by the result. * * * I feel that the rule in these cases should be that the material should be submitted to the Court in order that the Court as a judicial officer might determine whether or not it should be produced in a given case." The court suggested: "Suppose we do this then, if that is satisfactory—suppose Mr. Kerner produces the material which is within the reach of the subpoena and submits it to counsel

[2] Later, at Kerner's suggestion, the court ordered that the proceedings in chambers be made part of the record (R. 140).

for the relator and to counsel for the respondent, and then you can look at it, and then if you have any controversy about it I will act on it, otherwise——." Kerner then interposed to suggest that he was "still under orders not to actually produce the documents." (R. 126–127.)

After Kerner's statement that production of the records might be instrumental in causing the death of certain confidential informants (R. 127; see also R. 129, 131), he asserted that the only item of any possible relevance in the habeas corpus proceeding was the report on the F. B. I. "show up." Johnstone agreed. (R. 128.) Counsel continued (R. 129):

> By Mr. JOHNSTONE: Well, my information is that Factor was there, and Factor would not identify my client Roger Touhy at that show up. And that is the formal fact that I want to determine.
>
> By Mr. KERNER: I will tell you what this statement contains. It is purely a report, and is not evidence, of course. I think we will all agree with that. Factor did not identify him by face. He identified him by voice. And that is all that is in all of these reports that would be of any value anywhere along the line.

After a disagreement between Kerner and Johnstone as to whether this report would be admissible, Kerner remarked that he was "interested in the production of everything that is possible to assist you with your case," and also expressed

the desire, concurred in by Johnstone, that they reach "an agreement for the Judge to look over this one report" (R. 129–130). Responding to Johnstone's inquiries, Kerner promised to supply him with certain information not in the subpoenaed records, i. e., the date when the F. B. I. files on petitioner's case were closed and the circumstances under which petitioner was taken to Elkhorn, Wisconsin, instead of being kept in Illinois. After Kerner had again voiced his fear that production of all the documents in open court would "probably bring about the death of someone," the following occurred (R. 131):

> By Mr. JOHNSTONE: After all, this is a habeas corpus proceeding. And in a habeas corpus proceeding the broadest possible latitude is given to the trial court. The trial court can examine witnesses, affidavits, depositions, and what have you, all to the end that essential justice may be done.
>
> My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us.
>
> By the COURT: I don't want to see them—I don't want to see them without counsel.

Kerner then informed Johnstone that Factor was present at only one show up on July 22, 1933, and that the persons who were with him the night he was kidnaped were also present. In addition, Kerner disclosed the presence of one Devereaux, who was described as the agent who made the

F. B. I. report involved, Mrs. Factor, Jerome Factor, Epstein and Reddick, who were described as persons "who looked at Touhy" (R. 131–133). Thereupon, Johnstone told the court he did not see how anybody could possibly be injured by producing the reports, to which Kerner answered: "They won't be injured in fact because I want to try to bring this information to you in an informal fashion, because my orders are that I cannot produce these reports. But I am trying to help you as much as I can. * * * I have told you that before. And that is still my position. If that information is of any value to you, here it is. But I cannot produce the reports." Johnstone then requested the court to require that the Devereaux report be produced, adding that "Mr. Devereaux is in the city and is subject to subpoena. I have a subpoena made out for him." (R. 133.) Thereupon the following colloquy occurred (R. 133–134):

> By the COURT: I guess I misunderstood Mr. Kerner this morning. I got the impression, maybe because I wanted to do it, that he was going to submit to counsel, for the consideration of counsel, the papers which are called for by this subpoena; and I understood that counsel would make no announcement of anything in those papers other than such as was really material to the issues before the Court. But I guess I misunderstood you.

> By Mr. KERNER: I did not intend actually to bring the reports in because I was still under the orders of the Department.
>
> By the COURT: Well, I misunderstood you. Now, I will say to you frankly, if he really insists on this I will use all the power I have to get them. * * *

After the proceedings were resumed in open court, Johnstone made a motion that McSwain be directed to produce the documents specified in the subpoena. Kerner made an objection, not ruled upon by the court, that the service of the subpoena upon him was bad as not constituting valid service upon the Attorney General. (R. 134.) From the witness stand, in response to Johnstone's query as to whether he would produce the documents designated in the subpoena, McSwain stated: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." The court having announced its intention of holding McSwain guilty of contempt, Kerner advised: "May it please the Court, as counsel for McSwain I too have been in touch with Washington, and we cannot produce those reports, although we should like to, under order from the Attorney General, under Order 3229." (R. 135–136.)

McSwain was adjudged guilty of contempt of court and he was committed to the custody of the

Attorney General until he should obey the court's order by producing the records demanded by the subpoena (R. 144–145).

On appeal (R. 146), the Court of Appeals, one judge dissenting, reversed the order of the District Court and remanded the cause with directions that McSwain be discharged from the custody of the Attorney General (R. 174). Its view was that the records sought were privileged (R. 168), that the privilege had in this case been waived insofar as the Attorney General had, under Supplement No. 2, *supra*, pp. 3-6, agreed to submission of the material "to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed" (R. 168–170), that the trial court had refused this tender, and that "McSwain was not required to produce for any other purpose" (R. 171).

SUMMARY OF ARGUMENT

I

The F. B. I. records here ordered produced were privileged documents.

A. The privilege against disclosure which the Attorney General here asserted is directly supported by R. S. § 161, which authorizes the head of a department to prescribe regulations not inconsistent with law for the government of his department and the custody, use, and preservation of the records pertaining to it. Pursuant to

this authority, the Attorney General promulgated an order designating all official files and documents as confidential and forbidding disclosure except in the discretion of the Attorney General. *Boske* v. *Comingore*, 177 U. S. 459, directly establishes both that R. S. § 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional. The Government was not a party to the proceedings in the district court in this case. Therefore, the *Boske* decision squarely governs the case at bar. Decisions holding that where the Government institutes criminal proceedings it may not, in reliance on what would otherwise be a privilege to refrain from producing confidential files, refuse to produce such files where their production is vital to the accused's defense, are distinguishable. Similarly distinguishable is the district court decision which was affirmed *per curiam* by an equally divided Court in *United States* v. *Cotton Valley Operators Committee, et al.*, 339 U. S. 940.

R. S. § 161 is a reflection of the constitutional independence of the executive. The immunity from disclosure of materials deemed confidential by the executive has been consistently and successfully asserted as against congressional demands, and has been honored by the federal courts since the earliest days of the Republic. That the executive privilege is constitutionally supported is evidenced, too, by the recognition

accorded it by state legislatures and courts, as well as in the British law (see *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624).

C. The privilege thus granted to the executive reflects an established public policy based upon several elements. Among them are the efficient administration of the government free from interference, secrecy of matters of national security, protection of communications by informants, as well as the independent functions of the executive and the judiciary. Whether the public interest permits disclosure is normally for the executive to determine. For it is executive officers who are responsible for the administration of the laws and who are in a position to evaluate the importance of keeping confidential particular information sought, in relation to an entire course of government policy or action.

II

A. The Department of Justice, pursuant to Supplement No. 2 to Order No. 3229, tendered the subpoenaed documents for the personal perusal of the court for determination as to their materiality and whether in the best public interests they should be disclosed. This procedure was specifically stated by counsel for the relator to be entirely satisfactory to him. And he was the person, it must be remembered, who caused the issuance of the subpoena.

B. The Government, moreover, through the United States Attorney, did everything in its power to cooperate with counsel for the relator and, indeed, supplied him with the information he sought to elicit from the subpoenaed files. Relator was not prejudiced by the denial of the files themselves; he was given all the information in them to which he was legitimately entitled.

C. Under these circumstances, there is no occasion to inquire whether, when, and under what circumstances, the executive privilege may be overborne by countervailing considerations. The United States Attorney's recital from the records of the information sought by the relator, and the Attorney General's agreement to submit the records to the trial court, fully answered the necessities of the situation. To insist on complete disclosure would benefit the relator not at all and would unnecessarily intrude upon the very important and long-established executive privilege. Since, as the court below held, the trial court should have accepted the Government's tender, it erred in committing McSwain for contempt.

ARGUMENT

I

THE F. B. I. RECORDS WHICH THE DISTRICT COURT ORDERED McSWAIN TO PRODUCE PURSUANT TO SUBPOENA WERE PRIVILEGED DOCUMENTS

A. *Revised Statutes, Section 161, and a valid regulation issued thereunder, vest in the Attorney*

General the power and duty to determine the privileged character of the F. B. I. records which the district court ordered to be produced.—The privilege against disclosure which the Attorney General here asserted has the direct support of statute. Section 161 of the Revised Statutes (5 U. S. C. 22), quoted *supra,* p. 2, authorizes the head of each department of the Government to prescribe regulations, not inconsistent with law, "for the government of his department" and "the custody, use, and preservation of the records, papers, and property appertaining to it." Pursuant to the authority thus conferred, the Attorney General, in 1939, issued Department of Justice Order No. 3229, quoted at pp. 2–3, *supra,* which designates as "confidential" all official files, documents, and records in the offices of the Department of Justice, including the Federal Bureau of Investigation. The order forbids disclosure of such files, documents, and records, except in the discretion of the Attorney General or a designated official acting for him, and provides that when a subpoena *duces tecum* for the production of any such files and records is served on any employee, he shall decline to produce them unless otherwise expressly directed by the Attorney General.

If the Attorney General's order is within the authority granted by R. S. § 161, and if the latter section, as implemented by this order, is constitutional, the F. B. I. records which the district court

ordered produced were "privileged," and the contempt judgment entered against McSwain for declining to produce them on that ground was properly set aside by the court below.[3] We submit that *Boske* v. *Comingore*, 177 U. S. 459, directly establishes both that R. S. § 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

In the *Boske* case, the Commonwealth of Kentucky had instituted a proceeding to ascertain the amount and value of whisky in bonded warehouses owned by the defendants but not listed for taxation, and to enforce state and county taxes on such whisky. The United States Collector of Internal Revenue declined to file with the state court copies of the official records showing the liquor which the defendants had deposited in, and withdrawn from, bonded warehouses. The Collector was thereupon adjudged in contempt and committed to jail until he should comply with the court's demand. A federal district court released him on writ of habeas corpus, and, on appeal from the order of release this Court held that the Collector had properly refused to produce the records since the regulations of the Treasury Department forbidding their disclosure were binding and valid.

[3] The question of the impact of Supplement No. 2 to Order No. 3229 (quoted, *supra*, at pp. 3–6), and possible accommodation of the executive privilege to countervailing claims, is treated under point II, *infra*, pp. 44–58.

The Treasury regulation, like Order No. 3229 of the Attorney General, recited that disclosure of such records by a Collector is held to be contrary to public policy and not permitted, and that process issued for their production by a state or federal court should be directed to the Secretary for authentication and transmittal of the documents "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy" (177 U. S. at 461).

The Court stated that if this regulation was authorized by the statute, and if the statute was constitutional, the state authorities were without jurisdiction to compel the Collector to violate it. It was pointed out (177 U. S. at 467–468) that the Secretary was authorized by the statute to make regulations, not inconsistent with law, for the custody, use and preservation of such records, and it was held that the statute, R. S. § 161, was a valid exercise of congressional power under Article I, Section 8.

Turning to the question whether the regulation was inconsistent with law, within the meaning of the phrase as used in R. S. § 161, the Court stated: "There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law * * *" (p. 469). The Court commented that

"reasons of public policy may well have suggested the necessity * * * of not allowing access to the records * * * except as might be directed by the Secretary * * *." The interests of taxpayers as well as the functions of the Treasury Department might be affected adversely if disclosure were not so limited. The Court concluded that "At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress" (p. 470).

Boske v. *Comingore* has been followed by a series of lower court decisions in similar and related situations. See *Ex parte Sackett,* 74 F. 2d 922 (C. A. 9);[4] *In re Valecia Condensed Milk Co.,* 240 Fed. 310 (C. A. 7); *Walling* v. *Comet Carriers,* 3 F. R. D. 442 (S. D. N. Y.); *Federal Life Ins. Co.* v. *Holod,* 30 F. Supp. 713 (M. D. Pa.); *Stegall* v. *Thurman,* 175 Fed. 813 (N. D. Ga.); *In re Lamberton,* 124 Fed. 446 (W. D. Ark.).[5] The case at bar, it is submitted, is squarely governed by the *Boske* case and its

[4] The *Sackett* case held that government files in the possession of a subordinate official (an F. B. I. agent-in-charge, as in the case at bar) were immune from subpoena in a private antitrust action for damages, even though the documents sought were copies of records of the defendant which, it was alleged, the defendant had destroyed.

[5] See also *In re Weeks,* 82 Fed. 729 (D. Vt.), and *In re Huttman,* 70 Fed. 599 (D. Kans.), decided before the *Boske* case, but reaching the same result.

rationale. Here, as in *Boske*, the United States was not a party to the proceedings in the district court. For this reason, decisions like United *States* v. *Andolschek*, 142 F. 2d 503, 506 (C. A. 2), *United States* v. *Krulewitch*, 145 F. 2d 76, 78–79 (C. A. 2), *United States* v. *Beekman*, 155 F. 2d 580, 583–584 (C. A. 2), and *United States* v. *Grayson*, 166 F. 2d 863, 869–870 (C. A. 2), have no present relevance. The rationale of those cases is that where the Government brings criminal proceedings against persons for violations of the law, it may not, in reliance on what would otherwise be a privilege to refrain from producing confidential reports and records in its files, refuse to produce such documents, where their production is vital to the accused's defense. See R. 165–168, where the majority below reviewed and analyzed the cited cases and other cases similar in nature, and held that they in no way impinged upon the rule or principle of the *Boske* case.[6] See also *infra*, pp. 44–58.

[6] The unreported decision of the United States District Court for the Western District of Louisiana, affirmed *per curiam* by an equally divided Court in *United States* v. *Cotton Valley Operators Committee et al.*, 339 U. S. 940, was a case in which, like the Second Circuit cases referred to in the text, *supra*, the United States was the moving party (civil suit under the Sherman Act). There, the district court dismissed the Government's suit for failure to comply with orders, issued at the request of the defendants in pretrial motions, to produce for their inspection certain confidential F. B. I. reports. The Government, in its brief in this Court (No. 490, O. T. 1949), conceding that the *Boske*

B. *R. S. § 161 reflects the constitutional independence of the executive.*—The history of R. S. § 161 makes it clear that it is considerably more than a provision for routine administration by agency heads in handling their internal housekeeping. Rather, it was intended to be a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers. R. S. § 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553). As its history makes evident, R. S. § 161 embodies a recognition of the independence of the executive.

Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

> That the books, records, and other papers of the United States, that relate to this department, be committed to his custody, to

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case was distinguishable "in that the Federal Government is here, and was not there, the moving party" (pp. 34–35), argued that "that difference does not work a difference in result" (pp. 35, 57–63). As pointed out in the text, *supra*, however, this point of distinction between the *Boske* and *Cotton Valley* cases is not present here, for this case is like *Boske* in this respect.

> which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [*Journals of the Continental Congress*, Vol. XXII (1782), pp. 87–92.]

The complete change wrought by the Constitution in establishing the three independent branches (The Federalist, Nos. XLVII, XLVIII) was reflected in R. S. § 161. See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar Journal 319, 328–330. The privilege which it confers derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to congressional attempts to require production by the executive branch, often of the very type of documents involved in this case.[7]

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause, "if in his judgment not inconsistent with the public interest." H. Rep. No. 141, 45th Cong., 3d Sess., p. 3. And the committee continued (*id.* at pp. 3 and 4):

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[7] See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949) 10 Fed. Bar. J. 103–150, 223–259, 319–350.

> * * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.[8]

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

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[8] For a recent instance of congressional assertion of independence as against the judiciary, see 96 Cong. Rec. 565–566: H. Res. 427, 81st Cong., 2d Sess.: "* * * *Resolved*, That

There are many other instances of successful assertion of the executive privilege, *vis à vis* Congress, including one which gave rise to a great congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211–2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235–243; 8 Richardson, *Messages and Papers of the Presidents*, pp. 375–383; 17 Cong. Rec. 4095. And while there may very well be differences in the force of the privilege when it touches the interests of parties to a judicial proceeding,[9]

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by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * *." 96 Con. Rec. 1400, 1401; see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. 1695; H. Res. 469, 96 Cong. Rec. 1765–1766.

[9] But see the views of Senator Jackson, later to become an associate justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and

the executive's relations with Congress, if not controlling, are certainly relevant. For before a balance can be struck between claimed individual rights and an executive privilege (see *infra*, pp. 44–58), the weight to be given the privileges must be ascertained by reference to the history of its assertions and the reaction to those assertions.

Extended reference has already been made to this Court's decision in *Boske* v. *Comingore*, 177 U. S. 459, and the cases in which it has been followed. But, even before that decision, in *Marbury* v. *Madison*, 1 Cranch 137, Attorney General Lincoln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission while he was Secretary of State. "On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive" (1 Cranch 143). The Court said, "they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it * * *" (1 Cranch 144). Lincoln subsequently answered substantially all of the questions (1 Cranch 145).

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procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

When sitting at Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (1 Robertson, *Burr's Trials* (1808), pp. 177, 180, 186–188; 1 Dillon, *Marshall: Life, Character, Judicial Services* (1903), pp. XLVI–XLIX; 9 Ford, *Writings of Thomas Jefferson* (1898) pp. 55–57 (62)). In both cases, the Court avoided treating the issue as a test of power with the executive.[10]

Every Attorney General considering the problem has been of the opinion that information, disclosure of which would be detrimental to the public interest, is privileged, and that the determination of the executive is conclusive. 11 Ops. A. G. 137, 142–143; 15 Ops. A. G. 378; 16 Ops. A. G. 24; 25 Ops. A. G. 326. Attorney General Jackson said (40 Ops. A. G. 45, 49):

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly

[10] "In no case of this kind would a court be required to proceed against the president, as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op cit. supra*, p. 536.

held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison,* 1 Cranch 137, 169; *Totten* v. *United States,* 92 U. S. 105; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *Vogel* v. *Gruaz,* 110 U. S. 311; *In re Quarles and Butler,* 158 U. S. 532; *Boske* v. *Comingore,* 177 U. S. 459; *In re Huttman,* 70 Fed. 699; *In re Lamberton,* 124 Fed. 446; *In re Valecia Condensed Milk Co.,* 240 Fed. 310; *Elrod* v. *Moss,* 278 Fed. 123; *Arnstein* v. *United States,* 296 Fed. 946; *Gray* v. *Pentland,* 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson* v. *German Valley R. Co.,* 22 N. J. Equity 111; *Worthington* v. *Scribner,* 109 Mass. 487; *Appeal of Hartranft,* 85 Pa. 433, 445; 2 *Burr Trials,* 533–536; see also 25 Op. A. G. 326.[11]

The privileged nature of information acquired by public officials has been recognized by the

[11] Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 228; 1 Greenleaf, *Evidence* (1899 ed.), Sec. 251; 3 Jones, *Evidence* (4th ed., 1938), Sec. 762. Wigmore has been of the contrary view (8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2378a) since 1905 (1905 ed., Sec. 2375), although he recognizes a privilege for communications by informers and a limited class of state secrets, not clearly defined.

states in a variety of statutes protecting the confidence of communications or government documents.[12] Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.[13] In addition, many statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking laws, health reports, and many others.[14] The validity of such legislation forbidding disclosure of information by public officials has been upheld by the state

[12] Aside from statutes, the courts of the several states have long recognized the privileged nature of such data. Early cases give effect to the privilege of communications from informants, and to other limitations upon the attempt to obtain evidence from state officials by court process. See notes 21, 25 and 32, *infra*, pp. 38, 42 and 56.

[13] Calif. Code Civ. Proc. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9-203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25-1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31-0106 (1943); Ore. Comp. Laws Ann. § 3-104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104-49-3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann., ch. 177, § 9 (1949); Ga. Code Ann. § 38-1102 (1937).

[14] For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A.L.R. 1302.

courts.[15] The variance in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosure of this type of information indicates an accepted public policy and a recognition of the principles of the earlier court decisions and of the constitutional mandate that the executive be independent.

Nor can one ignore British judgments in the field of executive privilege. For while their constitutional system differs from our tripartite organization, they too have, as much as do we, the conflict between the demands of litigants and the necessities of executive privacy. There is available to us a most authoritative recent decision in which the problem has been thoroughly canvassed—the decision of the House of Lords

[15] *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N.Y.S. 2d 923 (1945); *Oklahoma Tax Comm.* v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok* v. *Margolis*, 221 Minn. 480, 22 N.W. 2d 850 (1946); *Fleming* v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden* v. *Bagan*, 139 Minn. 46, 165 N.W. 864 (1917); *Peden* v. *Peden's Adm'r*, 121 Va. 147, 92 S.E. 984 (1917); *In re Herrnstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co.* v. *Clintwood Bank*, 155 Va. 181, 154 S.E. 492 (1930); *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leare* v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N.E. 2d 483 (1940); *Dwelly* v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Simonsen* v. *Barth*, 64 Mont. 95, 208 P. 938 (1922). Contra: *In re French*, 315 Mo. 75, 285 S.W. 513 (1926).

in *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624.[16] The action arose out of the sinking of the submarine *Thetis,* and was brought by representatives of deceased seamen against the builders. Discovery was sought of the plans, contracts for construction, and other documents. The First Lord of the Admiralty filed an affidavit, claiming privilege from disclosure on the ground that it would be injurious to the public interest. As the Lord Chancellor put it:

> My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This ma-

[16] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords" (58 Law Quarterly Rev. 436). The decision also disapproves *Robinson* v. *State of South Australia* (1931) A.C. 704.

> terial one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties, but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit and declines to produce a document or objects to the production of a document by the other side.

After reviewing precedents and pointing out that the rule in criminal cases might be different, the opinion states:

> * * * The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

The Lord Chancellor then considers the manner in which the privilege should be raised and, a key issue in the case, whether the determination of privilege is to be made by the executive or by the court:

> Two further matters remain to be considered. First, what is the proper form in which objection should be taken that

> the production of a document would be contrary to the public interest? And secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?

He concludes that the privilege should be claimed by the head of the executive department:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e. g., departmental minutes, to which they belong.

And, on the second question, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.* (1909) Sess. Cas. 335—"A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *,"—the Lord Chancellor states that the executive determination of privilege is conclusive on the court. The opinion

discusses the basis on which the executive determination should be made.[17] It then outlines the consequences of the executive decision, made after due consideration:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his im-

[17] "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified; for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." (1942) A. C. at 642.

> mediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

This decision occasioned considerable comment, both pro[18] and con,[19] but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, s. 28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

The indications from this Court's opinion in *Boske* v. *Comingore,* 177 U. S. 459, seem to be that R. S. § 161 reflects the executive's constitutional independence of the judiciary as much as do these provisions of the Crown Proceedings Act.[20]

C. *The right to keep confidential documents of the kind here involved gives effect to sound*

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[18] *Production of Documents: The State and the Individual* (1942) 193 L. T. 224; 21 Can. Bar. Rev. 51; 58 L. Q. R. 31.

[19] 58 L. Q. R. 436; 59 L. Q. R. 102; 20 Can. Bar. Rev. 805.

[20] "* * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * *" (*Thompson* v. *German Valley Railroad Co.*, 22 N. J. Eq. 111, 114 (1871).

considerations of public policy.—The privilege granted to the executive by R. S. § 161 reflects an established public policy composed of a complex of elements. Among these are the interest in efficient administration of the Government free from interference;[21] secrecy of matters of foreign policy, security, and national defense;[22]

[21] In libel actions based on communications to government officials relating to the business of their office, the documents "are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity" (*Gardner* v. *Anderson*, Fed. Cas. No. 5220 (C. C. D. Md., 1876); *Gray* v. *Pentland*, 2 Serg. & Rawles 23 (Pa., 1815); *Harwood* v. *McMurty*, 22 F. Supp. 572 (W. D. Ky.)).

[22] Cf. President Truman's directive of March 13, 1948, 13 F. R. 1359). In *Totten* v. *United States*, 92 U. S. 105, a contract for espionage made with President Lincoln was held to be of its nature so confidential in the public interest that suit would not lie on it. Similarly, in a contract action between private parties, military secrets are privileged in the public interest, even if privilege is not claimed by a party (*Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 (E. D. Pa.); *In re Grove*, 180 Fed. 62 (C. A. 3); *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y.)).

The Attorney General's claim of privilege for the F. B. I. reports in the public interest is at least in part based on the needs of national security. Under the Attorney General, the F. B. I. is the branch of the Government primarily responsible for the internal security of the nation. Complete confidence of informants that they will be protected is of the highest importance to effective operation in this field. Secrecy of methods, personnel, sources and techniques is necessarily closely guarded. Thus *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624, 635, particularly recognizes

protection of communications by informants to officials; shielding of prospective witnesses from undue pretrial influences, particularly in criminal cases; as well as the constitutional doctrine of the independent functions of executive and judi-

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that "the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself." In *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.), conviction affirmed, 153 F. 2d 850 (C. A. 9), the defendant was charged with counterfeiting obligations of the United States, consisting of meal tickets for the Commissary of the Hanford Engineering Works. At that time, the nature of the business of the Hanford Engineering Works was the nation's most closely guarded secret. In order to convict the accused, it was necessary to prove that the Commissary was an agency of the United States. The Government claimed that the contract between the United States and DuPont, for operation of the plant, was privileged, but offered to introduce secondary evidence of those portions of the contract establishing the status of the Commissary. The district court permitted secondary evidence to be introduced on this point, by the testimony of a lawyer who had read the original contract (see 153 F. 2d at 852), and Haugen was convicted. There can be little question who was better qualified to determine whether, in 1944, a contract for the production of fissionable material was privileged—the district judge or the physicists and informed military men in charge of the project. And, even if the judge possessed adequate technical background to appreciate the enormity of the secret, had the court passed on the document it would, at the least, have added the judge, if not the clerk, to the select list of those having knowledge of a national secret.

ciary with which the preceding subsection of this brief was concerned.[23] Because the need for protecting the identity of confidential informants from disclosure appears to have weighed heavily in the Attorney General's decision to claim the executive privilege in this case (see *supra*, pp. 11, 12, 13, and *infra*, pp. 53–54), separate discussion of this aspect of the executive privilege would seem to be indicated.

In whatever form, free communication with private citizens is vital to the enforcement of the criminal laws. Without the cooperation of the public, many violations would not come to the attention of the Department of Justice, or could not be reached for lack of proof. The confidence of such informants in the law-enforcement arm of the Government is based in large part on the knowledge that their identity and information will be kept confidential and not made accessible to those who might wish to retaliate against the informer. The credit of the Department of Justice and the F. B. I. would be damaged se-

[23] Constitutional doctrines derive in part, of course, from considerations of public policy. And so, in a sense, this subsection of the Argument is merely an expansion of that immediately preceding. The division between the two is justified only by the fact that the preceding subsection dealt largely with what may be called institutional reasons for the executive privilege; *i.e.*, the necessary independence of the legislative, judicial, and executive branches one from another as part of a tripartite system of checks and balances—while this subsection deals with *other* policy considerations.

riously if discovery of informants' identity and the information supplied were generally permitted, with grievous consequences going far beyond the confines of this case. In some circles (*e. g.*, petty thieves, racketeers, tax evaders, as well as espionage agents, kidnapers, and the like), the fate of known informants is likely to be swift. And this case, said to arise out of a long and bitter feud between Touhy and the so-called Capone syndicate (R. 18–25), is a striking instance of the importance of protecting the identity of the Government's informants from disclosure. When it is known that conversations with the F. B. I. are quite likely to become matters of court record and subsequent publication, those conversations will be less frequent. Such news travels fast among those whose security and peace of mind depend upon maintenance of their anonymity.

The importance of protecting the anonymity of informants is thus so great that it has been given recognition as one of the prime reasons supporting the privilege of the executive not to make public its files. In *Vogel* v. *Gruaz,* 110 U. S. 311, 316, this Court pointed out that:

> * * * it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and * * * a court of justice will not compel

> or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.

Moreover, protection of informants' anonymity has been treated, separately, as an independent ground for exclusion. Thus, this Court has held that the identity of the informant and the nature of the information furnished "cannot be compelled without the assent of the government," *In re Quarles and Butler*, 158 U. S. 532, 536, unless it is essential to the defense. *Scher* v. *United States*, 305 U. S. 251, 254.[24]

Distinct from the protection of informants but related to the problem of keeping open the

[24] Washington, Cir. J., in *United States* v. *Moses*, Feb. Cas. No. 15825 (C. C. E. D. Pa., 1827): "Such a disclosure can be of no importance to the defence in this case, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they know to have been committed." Accord: *Elrod* v. *Moss*, 278 Fed. 123 (C. A. 4); *Arnstein* v. *United States*, 296 Fed. 946 (C. A. D. C.), certiorari denied, 264 U. S. 595; *Segurola* v. *United States*, 16 F. 2d 563 (C. A. 1), affirmed, 275 U. S. 106; *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Worthington* v. *Scribner*, 109 Mass. 487; *People* v. *Laird*, 102 Mich. 135, 60 N. W. 457; *State* v. *Soper*, 16 Me. 293; *Maine* v. *Fortin*, 106 Me. 382, 76 A. 896.

channels of communication with the government, is the protection of the innocent from the publication of information in the hands of the government which may be entirely false or which, being fragmentary, may produce a distorted picture. The danger arises because in many investigations, in the first instance, information of any type is sought—hearsay and gossip, the true and false, the remote and the contingent. Out of such undigested "raw material," the investigator and lawyer seek to discover the truth and to assemble evidence acceptable by legal standards. The government cannot afford to refuse the trivial and the malicious, for sometimes these lead to the important fact. Yet, by accepting them as a necessary part of an investigation, by no stretch of the imagination is credence given to them. Exposure of such trivia and falsehoods by the district court may work the gravest injury and injustice to those named. The Attorney General has consistently recognized his obligation to protect against publication of unverified accusations. It is all too apparent that later attempted exoneration seldom washes out the taint of the original unfounded accusation.

The determination of what documents should not be disclosed in the public interest is a determination necessarily within the discretion and distinctive knowledge of the executive branch. It is the executive who day in and day out is responsible for the administration of the laws and for the na-

tional security, and who is able to evaluate the importance of the particular piece of information sought in relation to an entire course of government policy or action. To the extent that the public interest is at stake in these circumstances, the public interest necessarily requires that the determination of what is privileged be made by the agency responsible for the national program for the protection of which the privilege is asserted. To divorce discretion from responsibility is in itself a denial of the public interest. See *infra*, pp. 55–56.

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT HAD IMPROPERLY REFUSED TO HONOR THE EXECUTIVE PRIVILEGE UNDER THE CIRCUMSTANCES OF THIS CASE

The relator seeks to distinguish *Boske* v. *Comingore*, 177 U. S. 459, on the ground that the Court "was not there concerned" as it is here "with the rights of an individual asserting Constitutional guaranties" and he argues that "that decision should not be regarded as laying down a definitive rule of law establishing an absolute executive privilege." (Br. 8). We may concede, *arguendo*, that in some limited circumstances which we are not here called upon to delineate, due process may require a tempering of the absolutism of the executive privilege and an accommodation to countervailing claims demanding consideration. But there is nothing in the circumstances of this case which justifies an intru-

sion on the executive privilege beyond that deemed appropriate by the Attorney General when he directed submission of the documents to the trial court.

A. *The Government's tender of the documents to the trial court fully met the relator's demands.*—In Point I of our Argument, we sought to show that, by virtue of R. S. § 161 and a valid regulation thereunder, Department of Justice Order No. 3229, the Attorney General enjoyed an absolute privilege to refrain from producing the F. B. I. records called for by the subpoena *duces tecum*. Actually, however, in this case, the Government did not stand upon this absolute privilege. Acting pursuant to Supplement No. 2 to Order No. 3229 (*supra*, pp. 3–6), Mr. McSwain, through United States Attorney Kerner (who represented McSwain throughout the proceedings in the district court), and in response to the subpoena *duces tecum* directed to him and the Attorney General, tendered the sought-after records to the court "for determination as to [their] materiality to the case and whether in the best public interests the information should be disclosed." Mr. Johnstone, counsel for the relator, who caused the issuance of the subpoena (*supra*, p. 6), expressed complete satisfaction with the course proposed by the Government. Thus, he told the district judge in the colloquy in the judge's chambers: "As far as I am concerned, I am perfectly willing to have the United States

Attorney submit the material to the Court, and abide by the result. * * * I feel tha. the rule in these cases should be that the material should be submitted to the Court in order that the Court as a judicial officer might determine whether or not it should be produced * * *" (R. 126–127). He again made his agreement with the proposed procedure crystal clear when he said: "My own feeling is that the proper thing to do would be to permit the Court to examine these things without any of us" (R. 131). The district court, however, notwithstanding this acquiescence of counsel, refused the tender, saying, "I don't want to see them [the records]—I don't want to see them without counsel" (R. 131).[25]

Notwithstanding his agreement with the course proposed in the trial court, the relator now argues that "there never was an actual proffer or submission of the documents to the court for a determination of the question of public interest involved. The United States Attorney's tender (R. 123) was, advisedly or not, limited solely to the question of materiality" (Br. 9). This argument, however, distorts the record. It is true that at one point during the proceedings in the

[25] It appears that the reason for the judge's refusal to accept the tender on the terms suggested was concern that counsel for the relator would be unable to "make his record" if he, the judge, viewed the documents in question in counsel's absence (see R. 123). Thus, the judge was more solicitous of the relator's rights than the relator's own counsel.

district court, United States Attorney Kerner told Judge Barnes: "It is a matter of discretion with the Court to ascertain whether or not they [the subpoenaed documents] are material, and I will provide them for the Court's personal perusal" (R. 123). But the context plainly indicates that there was no intention on Kerner's part to offer the documents to the judge solely for his determination with respect to their materiality. It just happened that at that particular point in the discussion, as is evident from the portion of the record immediately preceding Kerner's remark, only the question of the documents' materiality was under consideration. That Kerner tendered the documents to the judge for decision both as to their materiality and as to the need for nondisclosure in the public interest is clear from the facts, that, earlier, Kerner had advised the judge that he was declining to produce the documents "in compliance with Department of Justice Order No. 3229, *and also by Supplement No. 2 dated June 6, 1947*" (R. 115, italics supplied); had read to the judge the letter from Assistant Attorney General Campbell directing him to "proceed in accordance with the instructions given in Supplement No. 2 of Order No. 3229" (R. 116); and had read to the judge Supplement No. 2 in its entirety (R. 120–121). Supplement No. 2 (see *supra*, pp. 3–6), directs the officer or employee upon whom a subpoena for

official files has been served, unless otherwise directed by the Attorney General, to bring them to court (but not to the witness stand), and then explicitly directs that "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to *its materiality to the case and whether in the best public interests the information should be disclosed*" [italics supplied]. Thus, it is clear that petitioner is mistaken in now arguing that Kerner made a more limited tender of the documents than he was instructed to make by his Department superiors, through Supplement No. 2.[26]

In the light of this qualified tender of the records in question, and the relator's counsel's express concurrence in the suggested procedure, we submit that, quite apart from the legal issue as to the executive privilege to refuse to produce the records at all (discussed in point I, *supra*, pp. 18–44), the district judge was not warranted in holding McSwain in contempt for declining to

[26] Of course, as the Government pointed out at p. 5 of its reply brief in *United States* v. *Cotton Valley Operators Committee et al.* (No. 490, October Term, 1949), this Supplement "is not a public regulation" and "[i]n no sense does it bind or obligate the Attorney General", its purpose being solely "to inform United States attorneys of procedure to be followed in the absence of specific instructions from the Attorney General." But the fact that the Supplement is not binding on the Attorney General is of no significance in this case, since here the Attorney General directed compliance with its instructions.

make an unqualified tender of the documents.[27] It is true that Mr. McSwain, when on the witness stand following the colloquy that occurred in the judge's chambers, did not *personally* tender the subpoenaed documents to the district judge for a determination as to their materiality and as to whether their non-disclosure was essential to the public interest.[28] But, manifestly, it would have been futile for McSwain to renew the offer, previously made by his counsel (Mr. Kerner), which the court had rejected, to produce the documents for limited examination by the court alone. As the majority opinion below states, the court's previous refusal to examine the documents alone "perhaps accounts for the fact that McSwain when on the stand was not requested to make production for such purpose," i. e., to enable the court "to examine the material for the purpose of determining its materiality and whether it was in the best public interest that such information should be disclosed" (R. 171).

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[27] It should be noted that even Wigmore, who, alone among the distinguished commentators in this field, is opposed to any *general* executive privilege against disclosure of confidential office records (see fn. 11, *supra*, p. 30), agrees that such a qualified tender of records to the judge, for his private decision as to the need for non-disclosure, is the most that a litigant can demand. 8 Wigmore, *Evidence* (3d ed. 1940), § 2379.

[28] McSwain stated simply: "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229" (R. 135).

For these reasons, it is evident that Judge Lindley's dissent below (R. 171–173) was based on a misinterpretation of what actually transpired during the proceedings in the district court. Judge Lindley seems to have found it unnecessary to reach the "broad issue" of whether or not the Department of Justice was privileged to decline to produce the sought-after records at all (R. 171; but see R. 172–173). For, he said, "the Department of Justice * * * has provided by its own directives [i. e., by Supplement No. 2 to Order No. 3229] a method by which, by judicial decision, the rights of a person seeking to procure evidence in the custody of the Department, are fully protected. In other words, those directives, having provided reasonable protection for the rights of applicants, satisfy constitutional demands" (R. 171–172). That is to say, Judge Lindley continued, "[u]nder the pertinent administrative directive [i. e., Supplement No. 2], as I interpret it, it was the duty of [McSwain], as a subordinate in the Department of Justice, to produce the subpoenaed documents for examination by the court, in order that the latter might determine their materiality and whether their non-disclosure was essential to the public interest" (R. 172). "But," continued Judge Lindley, *"the evidence discloses that [McSwain] himself, while on the witness stand, unqualifiedly refused to produce them, and the ultimate statement of the United States Attorney plainly indicates that,*

pursuant to instructions from his department superior, the actual records would not and could not be submitted to the court for its determination in the respects mentioned. Thus, he said expressly that he had never intended actually to produce the documents and that he could not do so under the orders of his superior. Thus, * * * [McSwain] * * * violated the directive. The inevitable result is that the Department, despite its own directive, has taken upon itself the determination of materiality and public interest and effectually prevented the court from making a judicial determination of those questions", [italics supplied] (R. 172).

But, as we have already explained, and as recognized by the majority below, the reason for McSwain's not offering the records to the district judge for his personal examination alone was the pointlessness of such an offer in view of the judge's prior unequivocal rejection of the identical offer made by Mr. Kerner, McSwain's counsel. And Judge Lindley simply misreads the record in thinking that Mr. Kerner, the United States Attorney, refused to submit the documents to the district court "for its determination in the respects mentioned." As we have shown, this is precisely the offer which Mr. Kerner made to the court. Kerner's statements to the effect that he could not "actually produce" the documents (*supra*, pp. 11, 13, 14)—made after his tender of the documents to the court for the court's personal

perusal (*supra*, pp. 8–9)—obviously meant that he could not produce the documents in the normal manner in which documents are produced pursuant to subpoena, *i. e.*, spread them on the record for counsel and others to see.

But what the Government did offer to do was perfectly acceptable to the relator at the trial, and there was and is, consequently, no occasion to determine whether, in a case in which there is a justifiable demand for a more complete disclosure, the executive privilege would stand in the way.

B. *The relator makes no showing that the necessities of his case were such as to require complete disclosure of the departmental records.*—The record in this case makes clear that even had the relator expressed dissatisfaction with the course proposed by the Government, such complaint would be of no avail since his quest for information was not, in fact, rebuffed but was, instead, entirely successful.

United States Attorney Kerner, acting on behalf of Mr. McSwain, did everything in his power to cooperate with counsel for the relator in supplying him with the information he sought to elicit from the subpoenaed F. B. I. records, short of actually turning them over to him. Mr. Johnstone, the relator's counsel, made it clear that the only item in the records which he desired and which was relevant to his client's case was an F. B. I. report of a certain "show up" at which, it was believed, Factor had failed to identify his

client as the kidnaper.[29] Mr. Kerner gave Mr. Johnstone the date of this "show up," the names of the persons present besides Factor and Touhy, and the name of the F. B. I. agent who had written up the report, one Devereaux, who was then in the city and subject to subpoena (*supra,* pp. 12–13). Kerner even told Johnstone the crucial fact the latter was interested in, *viz,* that, according to the report, Factor was unable to identify Touhy "by face," though he did identify him "by voice" (*supra,* p. 11). Kerner agreed to supply Johnstone with certain other information not contained in the records, such as the date on which the files were closed on the Touhy case, and the circumstances under which Touhy was taken to Elkhorn, Wisconsin, instead of being kept in Illinois (*supra,* p. 12). Kerner explained that everything in the records other than the the Devereaux report was worthless to Touhy, and offered to submit the records to the judge for verification of that fact (*supra,* pp. 8–9, 11)—a procedure which, as has been pointed out, was entirely satisfactory to Mr. Johnstone. And the reason, or at least the principal reason, why he could not permit Touhy or his coun-

[29] "By Mr. KERNER: * * * that is the part you want to know something about, the show up at the Bureau of Investigation. That is correct, is it?

"By Mr. JOHNSTONE: That is right." (R. 128. See also pp. 8 and 11, *supra.*)

In the light of this explicit statement of the relator's needs, the trial court needed no further assistance in ascertaining what part of the records were, and what part were not, material. Cf. Relator's brief, p. 12.

sel to look at the records for themselves, Mr. Kerner explained, was the fact that they contained the names of certain confidential informants whose deaths might result if their identities became known (*supra,* pp. 11, 12).

The relator does not now, nor did he at the trial, attempt to show in what respect the information he had sought to obtain through the subpoena *duces tecum* has been denied him. The United States Attorney had revealed every fact to the relator with which he could have any legitimate concern (R. 127–134). The relator's only thought was that the "best evidence rule requires me to get the record of who was there if I can get it." (R. 129.) But the relator could not get the "best evidence" [30] because it was privileged and, in such circumstances, the rules of evidence are not so inflexible as to compel either denial of the executive privilege so well established (see *supra,* pp. 18–44) or to deny to the relator the right to use the information which Mr. Kerner had culled from the departmental records for him. Indeed, in a very similar case, a criminal conviction was upheld even though (1) a fact essential to the Government's case could be shown only by a government contract, (2) that contract was secret under Army regulations, and (3) the pertinent contents of the

[30] It is highly doubtful that the F. B. I. report constituted the "best evidence" of who were present and what took place at the show-up. Those who were present could undoubtedly give the "best evidence". See *supra,* pp. 12–13.

contract were shown through the testimony of an army lawyer who had possession of duplicate originals of the contract. *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.), conviction affirmed, 153 F. 2d 850 (C. A. 9). The district court's discussion of the "best evidence rule" in that case is dispositive of any fears the relator here may have harbored that, because of the "best evidence" rule, he could not utilize Mr. Kerner's statements with respect to the contents of the F. B. I. records to show what took place at the show-up. The conclusion there arrived at is well fortified by analogous rulings of this Court and other courts to the effect that "The rule requires the production of the best evidence of which the case admits and that when the evidence offered is clearly substitutionary in its nature and the unavailability of the original raises no suspicion of weakness in the substitute, the secondary evidence is admissible." *United States* v. *Haugen*, 58 F. Supp. 436, 439, and authorities there cited. See, particularly, *De Leon* v. *Territory*, 9 Arizona 161, 168–169 (secondary evidence admissible where best evidence is in the hands of a third party who, by reason of privilege, is not compellable to produce it).

C. *Consequently, this Court need not decide whether, when, and in what manner the claim of executive privilege is subject to judicial review.*—The balance of conflicting public interests involves a question "of high constitutional importance," *Duncan* v. *Cammell, Laird & Co.*,

supra, (1942) A. C. at 629, reflecting the relationship of the executive and the judiciary; it is peculiarly a problem which "should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."[31] It is the executive who is charged with the continuing administration of the laws and the maintenance of national security, and has the background information and technical knowledge necessary to evaluate what must not be disclosed in the public interest. In a government of separate powers, weight must be accorded to the judgment of the executive in a function primarily within his discretion, else his function is undermined.[32]

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[31] Washington's Farewell Address, Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 219.

[32] "In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts.

It may very well be, as the materials presented in Point I of this Argument indicate, that, in the light of the considerations just stated, it is proper to give conclusive effect to a determination by the Attorney General that certain executive documents are confidential and their disclosure against the public interest. But whether and in what circumstances this is so, it seems evident that on this record and in seeking to avoid an "exercise of the powers of one department to encroach upon another", sufficient respect should at least be accorded the Attorney General's view as to constrain the courts to accept a partial disclosure which met the demands petitioner made and those he could legitimately have made. When the necessities of the situation do not require it, resolution of the inevitably delicate question of

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"* * * the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. * * * [A]s judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. * * *" (*Appeal of Hartranft* (1877) 85 Pa. 433, 445, 447).

when, if ever, the judiciary can review the judgment of executive officers, who have also taken oaths to support the Constitution, that the public interest precludes disclosure, would be in the face of that sense of judicial abnegation which has guided this Court from the beginning.

CONCLUSION

The respondent McSwain's refusal to make an unqualified tender was proper for the reasons stated in Point I of the Argument. The conditional tender that was made met the relator's legitimate needs, as he himself recognized, and, hence, the district judge's refusal to accept the conditional tender and his decision, instead, to hold McSwain in contempt of court was error, as held by the Court of Appeals. Consequently, the judgment of the court below should be affirmed.

Respectfully submitted.

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